

OPEN SPACE COUNCIL
MINUTES
Legislative Hall
Senate Hearing Room, Second Floor
Dover, DE
June 10, 2008
9:00 a.m.

ATTENDANCE

Council Members:

Lynn W. Williams, Chairperson
Paul Boswell
Nathan Hayward, III
D. Wayne Holden
Harvey Marvel
William Powers, Jr.
John Schroeder
Representative Robert Valihura

Advisory to:

John A. Hughes, Secretary DNREC

Ex-Officio:

Charles A. Salkin, Parks & Recreation, DNREC

Public:

Roger Jones, DE Nature Conservancy

Staff:

Phillip Carpenter, Fish & Wildlife, DNREC
Robert Phillips, DAG, DOJ
Michael Valenti, Delaware Forest Service, DDA
Ron Vickers, Parks & Recreation, DNREC
LeeAnn Walling, Office of the Secretary, DNREC
Rose Ryödi, Parks & Recreation, DNREC

I. Call to Order/Announcements

Mrs. Lynn Williams, Chairperson, called the regular Open Space Council meeting to order at 9:10 am. She welcomed Council members, visitors, and staff and asked for announcements. There being none, meeting proceeded.

II. Review of Minutes of the March 11, 2008 Meeting

Mrs. Williams asked for corrections to the March 11, 2008 minutes. Hearing none, she asked for a motion to approve the minutes. Council moved and seconded to accept the minutes as written.

III. Financial Report

Mr. Vickers presented the financial report. The remaining Realty Transfer Tax fund for FY2008 is \$27,906.52. The State of Delaware asked for the return of all interest generated on Open Space Program funds from July 2007 to March 2008, which amounted to \$174,850 and non-contractually obligated realty-transfer tax funds of \$300,000. There are six previously approved projects not settled, totaling \$2,609,639.67. The Open Space Program is anticipating the federally approved reimbursement refund related to the Coastal and Estuarine Land Conservation Program (CELCP) for \$2,997,000.00. Once the match properties are approved, this money will be available for use by the Open Space Program.

It is unknown how much funding to expect for FY2009. Typically, the Open Space Program receives \$9 million at the end of June. The Budget Office has asked for information on new and pending projects that involve leveraging federal funds. Mr. Vickers is waiting to hear from the Budget Office. He asked that during deliberations at Executive Session, Council should include 'pending funding' when approving projects.

The Ellendale/Redden SRA - Fischer property and Cape Henlopen SRA - Rustic Lands settled since the last meeting.

An updated Open Space Inventory is available upon request.

IV. Agency and Public Presentations – Matters Arising

Mrs. Williams welcomed Roger Jones from Delaware Nature Conservancy.

Mrs. Williams referred to handouts on the Master of the Court of Chancery's draft report regarding the State Resource Area and Natural Area maps litigation.

Mr. Vickers noted the first page of the handout "State Resource Areas, A Proposed Path Forward" gives a summary of the Master's 26-page report. The second page outlines the path forward for developing standards and criteria for the maps and the process for public input, with the eventual adoption of new SRA maps that would be transmitted to each county government. The suggested path forward is as follows:

- Open Space Council shall discuss the process and appoint a committee to work with the Interagency Working Group
- Committee/Group shall develop standards and criteria for evaluating SRA's within context of the Delaware Land Protection Act
- Committee/Group present draft standards and criteria before the full Open Space Council
- Open Space Council shall hold public hearings on SRA maps' standards and criteria
- Open Space Council shall review final standards and criteria and recommend to Department for adoption
- By Secretary's Order, Department shall review and adopt standards and criteria
- Committee/Group shall oversee development of SRA maps using adopted standards and criteria
- Draft maps shall be presented before the full Open Space Council
- Public hearings on draft maps shall be held by Open Space Council
- After evaluating comments from the public, Open Space Council shall carry out a final review of the SRA maps and recommend to Department for adoption
- Department shall review and adopt SRA maps by way of a Secretary's Order
- SRA maps, once adopted, shall be sent to the counties for inclusion in the Comprehensive Land Use Plans
- SRA maps shall be updated every 5 years
- Open Space Council may adopt procedural rules and regulations to carry out the provisions of the Land Protection Act

Mrs. Williams said the draft report ruled against DNREC and the three counties on the SRA maps based on procedural matters. When creating SRA maps, DNREC did not use standards and criteria developed and approved by the Council as directed by the Land Protection Act. Instead DNREC used standards and criteria developed by DNREC to come up with the new maps. In order to rectify this situation the Council must prepare the standards and criteria. She asked Council members if they wished to volunteer to work with her and the Interagency Working Group on this.

Mr. Holden said he observed the absence of legal counsel during the 2007 SRA process. No legal counsel attended any of the three county workshops to ensure that the process, from a legal standpoint, was correct. Time would have been saved and no need for a second process if DNREC's Secretary had legal representation. A counselor would have had intimate knowledge of the whole process when the lawsuit transpired. Mr. Holden suggested that if the Council was going to start the process again, it would be an essential part of this process to have legal representation, hired by this body, to see it successfully resolved. He suggested using outside counsel.

Mrs. Williams asked Councils' thoughts on Mr. Holden's suggestion.

Mr. Hayward said it was a good idea; but realistically, it would be a tough sell.

Secretary Hughes asked whether this Council had the authority or right to hire outside legal counsel.

Mr. Salkin said the department had to obtain special approval to hire local counsel in each county for land settlements. Currently, three outside firms provide services to the agency. He is doubtful these firms have permission to work on the SRA program. The Open Space Council does not have independent authority to hire counsel.

Secretary Hughes referred to House Bill 269 sponsored by Representative George Carey. This bill requires that the land use requirements established under §7508 of the Land Protection Act only apply to lands that have been permanently protected. He read a letter he is preparing to send to Rep. Carey that strongly opposes HB 269. It also calls on Rep. Carey to table his bill and allow for the formation of a stakeholder group to review the SRA process.

Mrs. Williams said the draft Chancery Court report only dealt with the development of the standards and criteria. It did not address the due process and equal protection issues.

Mr. Phillips said the draft report dealt with the lack of standards or criteria that Council used to evaluate and select SRAs. The Council was statutorily charged with developing the standards and criteria used in determining what is an appropriate SRA. He noted that Council did not specifically vote upon any Council criteria. If Council wants to move forward, it must develop standards and criteria that are approved by Council by a majority vote, after a public hearing. Only after this process can maps be developed using those approved standards and criteria.

Secretary Hughes said he has attempted to meet the letter and intent of the law and to do everything possible to move the SRA process forward collaboratively with the people of Delaware. He has established the need for SRAs and the need for protection of them. The lack of clear communication with the public is what led people to believe DNREC was taking property away from them.

Mr. Boswell said the average person has a different perception of how the SRAs affect the value of their land. Council must come up with strict criteria that can establish a basis for designating an SRA; otherwise, the public does not want to hear anything about it.

Mr. Powers said he understood the property owner's issues but agreed with Secretary Hughes's letter to Rep. Carey.

Roger Jones said he attended the House Committee meeting discussing the two bills. The Nature Conservancy opposed both bills but noted strong support from the committee. He believes both bills will quickly pass in the House and Senate.

Rep. Valihura said he applauded Secretary Hughes' letter. If Rep. Carey did not table the bill, he proposed the Governor consider vetoing it when it gets to her desk – with a

statement including everything in Sec. Hughes' letter. He does not believe Rep. Carey will change his mind and is willing to put up a fight. He said the fact that the government is proposing to take money from the Open Space Program to help with the budget shortfall is an awful legacy. The best time to buy land is now, when the market is down. Governor Minner should weigh in and support the program.

Mrs. Williams asked for a motion and vote from the Open Space Council requesting the Governor maintain full funding for the Open Space Program in light of the market trend and low cost of land. It was moved, seconded, and agreed, based on discussion.

Mrs. Williams noted that Sec. Hughes' letter said he would recommend to the Open Space Council not to proceed on a path forward on SRAs until he had formed and met with a new stakeholder group.

Mr. Hayward said it would be in the best interest of the Council to stand down for three months to see what the landscape looked like in September. At that time, it could establish a timeline for moving forward.

Rep. Valihura asked if the Council was under any mandate to act right away.

Mr. Vickers replied the Master's report is still in draft only. In addition, the only timeline in the Land Protection Act was for the counties to develop environmental performance standards and regulations within 18 months of receiving the maps for inclusion in their comprehensive plans.

Mr. Holden asked the Secretary whether there was any precedent for a request to be made from a State regulatory body to a Federal regulatory body to apply regulations or actions more stringent than the Federal requirements. For example could the State request that the Corps of Engineers enforce tighter restrictions on the use of wetlands in Delaware as opposed to other jurisdictions.

Sec. Hughes said he has attempted this but had poor success when waiting on the Federal Government.

After a lengthy discussion, Council voted not to take action at this time but to continue discussions at the September 9, 2008 Open Space Council meeting on the subject of "A Path Forward".

Roger Jones thanked Council for approving Poplar Thicket/Okie. He planned to transfer title to the department by the end of the month. There will be a dedication ceremony by the Governor on September 19 on-site and Council will receive invitations.

He encourages support for three projects that are pending funding and is aware Council cannot take action until June 30 after budget discussions are completed.

He said it is the Nature Conservancy's wish to convey the Okie property to the State with the hopes and desires that matching funds be used to acquire the Niemann property. He

would like to advocate for acquisition of the ABC Woodlands properties and the Borthwick property at Blackbird Forest. He thanked Council for its action to encourage the Governor to act on preserving these lands.

Secretary Hughes wished to go on record saying that the Freedom of Information Act allows for the discussion of site acquisitions in executive session. However, proposed legislation discussions at these Council meetings are open to the public.

V. Executive Session - Discussion of Site Acquisition Contracts

The Council adjourned to Executive Session at 9:50 a.m. to discuss site acquisition contracts. The Council returned to Open Session at 11:30 a.m.

VI. Project Recommendations

Based on discussions in Executive Session, Council determined the following:

- A. Poplar Thicket-Niemann - Inland Bays SRA, 118 acres – Fish & Wildlife: It was moved, seconded and agreed, based on discussion in Executive Session to acquire the property for \$3.6 million with multi-year payments, pending funding and final negotiations with the Niemann family.
- B. ABC Woodlands-Windsor Farms - Ellendale/Redden SRA, ±387acres – Forestry: It was moved, seconded, and agreed, based on discussion in Executive Session to acquire a conservation easement on the property for \$2.0 million with multi-year payments, pending funding.
- C. Borthwick – Blackbird SRA, 54 acres – Forestry: It was moved, seconded and agreed, based on discussion in Executive Session to acquire 54 acres at a cost of the appraised value of \$12,000 per acre/or pending final negotiations with family and pending funding. This property would be used as part of the CELCP match.
- D. Elechko – Inland Bays State Resource Area - 1.0 acre – Parks & Recreation: It was moved, seconded, and agreed, based on discussion in Executive Session to approve up to \$100,000 towards purchase of the property, pending funding.

Mr. Hayward noted that all recommendations should be pending funding and/or the purchase of a right of first refusal because of the current budget shortfall.

VI. Next Meeting and Adjournment

The next regular meeting of the Open Space Council is Tuesday, September 9, 2008 at 9:00 a.m. at the Legislative Hall, Second Floor, Senate Hearing Room, Dover, Delaware.

Meeting adjourned at 11:35 a.m.

Respectfully submitted: Rose Ryödi